Appeal No. 2006AP1826-CRAC **Cir. Ct. No. 2006CF621**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD SCHAEFER,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Brown and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does a criminal defendant have a subpoena right to obtain and copy police investigation reports and nonprivileged materials prior to the preliminary hearing?

BACKGROUND

The relevant procedural background is brief and undisputed. On May 25, 2006, the State filed a criminal complaint charging Ronald Schaefer with two counts of second-degree sexual assault of a child in the City of Brookfield

occurring more than sixteen years earlier. Ten days before the preliminary hearing Schaefer served a subpoena duces tecum on the Brookfield Police Department, with notice to the State, directing records in the possession of the police be produced before a court commissioner.[1] The court commissioner quashed the subpoena. Schaeffer filed a motion for a de novo hearing and the circuit court again quashed the subpoena. We granted Schaefer's motion for leave to appeal.

DISCUSSION

Schaefer contends that he is constitutionally entitled to effective assistance of trial defense counsel and that his counsel can be effective at the WIS. STAT. § 970.03 (2003-04)[2] preliminary examination only if fully prepared to address State witnesses and evidence and to present defense evidence. He turns to the Sixth Amendment rights to counsel and compulsory process as well as several Wisconsin statutes to support his argument. The State counters that there is no constitutional or statutory authority for Schaefer's position and that Wisconsin case law defeats his argument. Both parties acknowledge that this is a case of first impression and agree that this issue is likely to recur.

While the right to the preliminary hearing is statutory, the right to effective counsel at all criminal proceedings, including the preliminary examination, is constitutionally guaranteed. ***State v. Wolverton***, 193 Wis. 2d 234,

[1] The subpoena directed the police department to produce "[a] complete copy of all reports, memorandums (sic), witness interviews and any records related to the investigation and arrest of Ronald Schaefer on suspected criminal offenses or relating to the alleged sexual assault … in 1990."

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise stated.

252-53, 533 N.W.2d 167 (1995), *overruled on other grounds by* ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582 (addressing the reliability of eyewitness identification). The Sixth Amendment states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." The right to counsel is defined as the right to "effective assistance of counsel." ***United States v. Cronic***, 466 U.S. 648, 654 (1984) (citation omitted).

In ***State v. Harper***, 57 Wis. 2d 543, 552-53, 205 N.W.2d 1 (1973), the supreme court emphasized the duty of counsel to investigate the circumstances of the case and explore all avenues that could lead to facts that are relevant to either guilt or innocence. It turned to the American Bar Association's Project on Standards for Criminal Justice, citing with approval the section addressing a defense attorney's duty to investigate, which provides:

> 4.1 **Duty to investigate**. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

See ***Harper***, 57 Wis. 2d at 553 n.3.[3] Schaefer contends that without the power to subpoena police records in advance of the preliminary hearing, his attorney cannot

[3] The most recent version is found in the *American Bar Association Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-4.1(a) (3d ed. 1993), which states:

(continued)

fully prepare for the hearing or meaningfully exercise his statutory authority to call, examine and cross-examine witnesses; thus, Schaefer's right to effective legal representation at the preliminary hearing is illusory.

Schaefer also submits that the exercise of subpoena power prior to a preliminary examination is statutorily sound. He points to WIS. STAT. § 972.11(1), which provides that, except in certain situations, civil rules of evidence and practice apply in criminal cases. Among these civil rules of practice are WIS. STAT. § 805.07(2), which provides for the issuance of a subpoena duces tecum to third parties, and WIS. STAT. § 885.01, which addresses the power to subpoena witnesses to give testimony. Schaefer emphasizes that there is nothing in the statutes that prohibits or limits the use of a subpoena prior to the filing of the information in a criminal case. In other words, there is no statutory prohibition on his attempt to obtain nonprivileged information from the police department in advance of the preliminary hearing.

The State counters that Schaefer is attempting to evade discovery statutes that delay pretrial discovery until after arraignment. It points to WIS. STAT. § 971.31(5)(b), which states that in felony cases, "motions to suppress evidence or motions under s. 971.23 [to compel discovery from the district

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> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

attorney] or objections to the admissibility of statements of a defendant shall not be made at a preliminary examination and not until an information has been filed." The principle underlying this practice is explained in ***State ex rel. Lynch v. County Court, Branch III***, 82 Wis. 2d 454, 262 N.W.2d 773 (1978). The ***Lynch*** court addressed a defendant's right to conduct a generalized inspection of documents in the prosecutor's file prior to trial. ***Id.*** at 464-65. There, the court denounced the "generalized inspection of the state's files by the defense at this early stage, where there had been no showing of particularized need for inspection" because at the time of the preliminary hearing, the charges are considered "tentative or provisional." ***Id.*** at 465-66. The court concluded, "At the preliminary hearing stage … and in the absence of a showing of particularized need, the identification of exculpatory material must be entrusted to the good conscience of the prosecution …." ***Id.*** at 468.

Lynch, however, is not analogous to the present case. There, the court addressed a defendant's Fifth and Fourteenth Amendment fair trial and due process rights to disclosure of information from state files prior to the preliminary examination and did not address a defendant's Sixth Amendment rights concerning compulsory process and effective counsel.

Furthermore, ***Lynch*** did not distinguish documents in the possession of the prosecutor from documents in possession of a third party, such as a municipal police department. On this point, Schaefer argues that the documents he sought are in the possession of the police, an independent municipal agency, and not the office of the Waukesha County District Attorney. According to Schaefer, documents in the custody of a municipal law enforcement agency are and should be subject to compulsory process under the Sixth Amendment. The State responds that for purposes of a criminal prosecution, the police department

and the district attorney's office "are the same entity — *the state*." It therefore posits that, under ***Lynch***, a defendant is not entitled to receive police reports until after a WIS. STAT. § 971.01 information has been filed. To hold otherwise, the State suggests, would contradict the policy adopted in ***Lynch*** which seeks to avoid "needlessly complicat[ing] the relatively informal procedures applicable at this early stage of a prosecution." *See* ***Lynch***, 82 Wis. 2d at 466.

Finally, the State contends that subpoena powers pursuant to WIS. STAT. §§ 805.07 and 885.01, which were not developed in the criminal context, should not be allowed to override more specific criminal discovery statutes. *See* WIS. STAT. § 972.11(1) (except for specific circumstances, rules of evidence and practice in civil actions are applicable in criminal proceedings *unless the context manifestly requires a different construction*). The State urges that the criminal context does indeed require a different construction than the relatively unfettered discovery procedures in civil matters. It asserts that, because WIS. STAT. §§ 971.23 and 971.31(5)(b) establish more specific procedures for the production of documents in the criminal context, they promote the orderly and efficient administration of justice and avoid unnecessary delays that would accompany broader discovery procedures in the preliminary stages of a prosecution.

CONCLUSION

This case presents sufficient public and media interest to warrant an article on the front page of the *Milwaukee Journal Sentinel* Metro section on December 2, 2006. The article indicates that the Wisconsin Innocence Project and the State Public Defender's office, along with Schaefer, "are calling for the end of

the long-standing practice of withholding police reports from defendants in the early stages of prosecution."[4] Because this case presents an issue of first impression and of statewide concern, and requires the court to balance constitutionally protected rights, statutorily created procedures, and policies affecting the administration of justice in Wisconsin, we respectfully certify the matter to the supreme court.

[4] David Doege, *Agencies join push for early access: Teacher's defense wants to see police reports immediately*, MILWAUKEE JOURNAL SENTINEL, December 2, 2006, at 1B. Currently available online at http://www.jsonline.com/story/index.aspx?id=537510.